ing, in compliance with Rule 58, expired at midnight on March 16, 1962. The circumstances of petitioner's default under Rule 58 are set forth below:

(a) I represented petitioner in the District Court and the Court of Appeals; but, for reasons of health, I was unable to represent him in the preparation of his petition for a writ of certiorari, or to assist its preparation by new counsel. After the petition for a writ was denied I undertook, against medical advice, to prepare a petition for rehearing. I did so because, among other things, the petition failed to demonstrate the prosecution's knowing use of false testimony against petitioner and to apprise the Court of the serious resultant question of denial of due process, and because, for that reason and many others based on the conduct of the trial, it is my earnest conviction that petitioner was not accorded a fair trial.

(b) On or about February 22, 1962 Dr. Earl C. Shaw, whose office is at 30 Central Park West in New York City, examined me, made a finding of acute exhaustion, and ordered complete rest for at least ten days and minimal professional work for an indefinite period thereafter. The sustained and intensive work necessary for timely completion of the petition for rehearing was therefore interdicted.

(c) In consequence only the portion to which the annexed petition is limited had been drafted by March 14; and I worked continuously thereafter until 8 p. m. on March 16 to complete points dealing with other and equally important grounds for rehearing.

(d) Additional loss of time resulted from unexpected difficulty in obtaining emergency printing services, and the death on March 12 of an old and close friend.

(e) At 8 p. m. on March 16 it became necessary to limit the petition to the then draft of the portion which comprises the annexed petition; and, as so limited, it was printed and bound by 9:20 p. m. I then rushed by taxicab to La Guardia Airport to catch the 10 p. m. shuttle plane to Washington, and missed it by a few seconds. No other timely transportation was available.

(f) After calling the guardroom at the Courthouse and Mr. Cullinan at his home, I sent a long telegram to Mr. Justice Harlan requesting an enlargement of time. But it was not delivered until March 17; and the request was denied for that reason.

(4)

It is respectfully submitted that these facts, coupled with the serious grounds of the annexed petition, should persuade the exercise of the Court's discretion in petitioner's favor.

(5)

Submission of this motion has been delayed by a long and fruitless search for lost copies of Court Exhibits 83 and 84, and unavailing requests for permission to inspect and copy from the originals (see *infra* p. 6, fn. 4).

(6)

I certify that this affidavit, and the motion it supports, are presented in good faith and not for delay.

EDWARD M. GARLOCK.

Sworn to before me this
7th day of April, 1962.

BENJAMIN F. OAKLEY
NOTARY PUBLIC, STATE OF NEW YORK
No. 24-8171400
Qualified in Kings County
Cert. filed with Kings & N. Y. Co. Clks.
Term Expires March 30, 1964

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 587

LEO B. MITTELMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EDWARD M. GARLOCK,
Attorney for Petitioner,
521 Fifth Avenue,
New York 17, New York.

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays for rehearing of his petition for a writ of certiorari, which the Court denied on February 19, 1962, on the grounds:

that his petition failed to state the facts showing the prosecution's deliberate use against him of false and prejudicial testimony; and hence

that it failed to apprise the Court of the serious resultant question of denial of due process.

The prosecution's admitted and knowing use of false and prejudicial testimony against petitioner raises a serious question of due process, and requires the exercise in his favor of the Court's supervisory powers over federal administration of justice.

The petition presented the question whether petitioner had a fair trial where the prosecutor knowingly adduced false and prejudicial testimony against him (p. 4). The testimony thus referred to was Carroll's testimony, that on July 15, 1955 McCarthy claimed control of Texas-Adams *in petitioner's presence*, that on July 22, 1955 McCarthy *and petitioner* claimed such control, and that on August 8, 9 or 10, 1955 *petitioner* said that Texas-Adams would probably merge with Homestead—testimony designed to link petitioner with knowledge of and participation in the fraudulent Count 1 scheme. But the petition failed to show plainly that Carroll's testimony was necessarily false, and that the prosecutor knew it was false when he adduced it. Had the petition done so it is hardly conceivable that this Court would have condoned such gross misconduct and refused to entertain the question of due process it plainly raises.

A. The background of Carroll's false testimony, and the prosecutor's prejudicial purpose in adducing it:

Count 1 alleged that the defendants Crosby, McCarthy and Pettit—and only those defendants—devised and executed a scheme to defraud Texas-Adams' stockholders by diverting its funds to purchase a controlling block of its stock (J. 36a-39a).

Count 2 alleged a different scheme and named petitioner, Meredith and Texas-Adams as additional defend-

ants. But it incorporated the operative allegations of Count 2 by reference (J. 40a). And Count 50, which charged a conspiracy to violate the Securities Act, also incorporated those allegations by reference (J. 87a-8a).

The government's Count 1 evidence comprised all the testimony of nine witnesses (J. 157a-286a), portions of the testimony of three others (J. 286a-308a, 836a-8a, 851a-4a, 858a, 1337a-40a, 1352a-3a), and numerous exhibits. *None of it connected petitioner with the conception or execution of the Count 1 scheme, directly or indirectly.*[1] On the contrary, it established: that Norman Annenberg, who had represented Crosby since 1952 (J. 835a), and his associate Emanuel Lewis Greene, represented the Count 1 defendants in the acquisition negotiations and at the closing (J. 267a-8a, 279a-82a); that their prospective fee was 100,000 Texas-Adams shares (Ex. 18B); that the acquisition of Texas-Adams was a minor aspect of a joint venture in which only the Count 1 defendants were participants (Ex. 18B); that they contemplated continued employment of Messrs. Annenberg and Greene as counsel in the conduct of the joint venture (Exs. 18A and B); and that the joint venture did not contemplate acquisition of or merger with Homestead (*id.*).

Moreover, the prosecution never claimed or tried to show that the preceding Dumont and Continental transactions, in which petitioner participated with McCarthy and others (but not with Crosby, Pettit or Meredith), con-

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[1] The sole reference to petitioner in all this evidence occurs in Ex. 31B, a chart which traced the source of the $45,000 paid at the closing of the Count 1 transaction. It shows that on September 19, Pettit transferred $10,000 to McCarthy via petitioner's bank account; and that later McCarthy used part of Pettit's funds to consummate the transaction. There is no evidence that petitioner had any knowledge of or connection with McCarthy's later use of those funds.

templated any diversion of corporate funds to defray the cost of acquiring control; and the evidence proved the contrary (see *e.g.* Exs. 38 and M55F). Carroll's testimony therefore served the important prosecution purposes of connecting petitioner before the jury with knowledge of the Count 1 transaction, and implying his participation in it.[2] And, as will soon appear, the prosecutor's knowledge that Carroll's testimony was necessarily false did not deter him from using it.

B. Carroll's testimony, the prosecutor's prior knowledge of its purport, and its intentional elicitation:

Accordingly Carroll testified as a government witness: that, at a meeting in New York on July 15, 1955, *and in petitioner's presence,* McCarthy named Texas-Adams as one of several companies he controlled and could merge with Homestead (J. 518a-20a); that, at a second meeting in Denver on July 22, 1955, McCarthy *and petitioner* "discussed • • • the merger of Homestead into one of the McCarthy companies" and named Texas-Adams as one of those companies (J. 523a-4a); and that, at a third meeting in Denver on August 8, 9 or 10, 1955, *petitioner* discussed the impending "merger of Homestead into one of the three companies mentioned prior" and said "it would probably be Texas-Adams" (J. 526a-7a).

There can be no question regarding the prosecutor's prior knowledge that, if he desired to elicit it, Carroll would give such testimony. For Carroll had given similar testi-

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[2] The pre-Texas-Adams Homestead evidence, which the Court below conceded was "quite prejudicial and might have been excluded," was designed to establish a motive for such otherwise unproved participation. The government's trial memorandum, supporting the admissibility of that evidence, asserted that it "establishes the (petitioner's) motive for the robbery of the Texas-Adams treasury" in the Count 1 transaction.

mony before the grand jury which indicted petitioner (Court Ex. 7 for identification, pp. 14-16).

Nor can there be any question regarding the prosecutor's intention to elicit such testimony. The record speaks for itself. As to the July 15 meeting the relevant questions and answers were (J. 520a):

> "Q. Did he name the corporations he was in control of? A. Yes, he mentioned three corporations to the best of my recollection, Dumont Marine, Texas-Adams, and Superior Chemical I think or Superior Dye.
>
> "Q. Now, during what part of the conversation was Mr. Mittelman present? A. Mr. Mittelman was present during most of the conversation, * * *."

And as to the July 22 meeting the relevant questions and answers were (J. 524a):

> "Q. Now what was said to whom and by whom?
>
> * * * *
>
> A. Mr. McCarthy and Mr. Mittelman discussed with Mr. Branch and myself and Mr. Holland the merger of Homestead into one of the McCarthy companies.
>
> Q. Were the McCarthy companies specified? A. Yes, sir, they were.
>
> Q. What were they, sir? A. One was Dumont or Dumont Marine & Aviation, I believe, one was Superior Tool & Die, and Texas Eastern—or Texas-Adams were the theree companies mentioned at that time.
>
> The Court: Well, were they mentioned in the alternative or in the aggregate or how were they mentioned?
>
> The Witness: Sir, they were mentioned as one of them being a possible parent company for Homestead to merge into.
>
> The Court: I see."

C. The proof that Carroll's testimony was necessarily false, and the proof—apart from the government's admissions below—that the prosecutor knew it was false when he adduced it:

Many days later another government witness, Rosen, testified: that he and Crosby placed an advertisement in the Wall Street Journal on August 9, 1955, seeking control of a public company; that he received a reply from the broker defendants; and that he and Crosby conferred with them thereafter regarding purchase of their controlling block of Texas-Adams shares (J. 1337a-40a; 1352a-3a; Goldberg, R. and G. Ex. 18).[3]

The prosecutor himself referred to that advertisement as "*The one that led to Texas-Adams*" (J. 1337a). Moreover, Rosen had been subjected to intensive interrogation before the trial (J. 1354a-7a); and the prosecutor obviously knew the facts regarding that advertisement, and the events it set in train, before Carroll testified.

If the Court entertains any doubt that the prosecutor knew those facts before he elicited Carroll's testimony, it is respectfully urged to examine Rosen's prior testimony before the Attorney General of the State of New York, his prior testimony before the grand jury which indicted petitioner, and the prosecutor's notes of his prior interviews with Rosen (respectively Court Exs. 84, 83 and 82 for identification).[4] Petitioner is confident that examination of those records will dispel any such doubt. And he challenges the Solicitor General to make and support the claim that the prosecutor did not know Carroll's testimony was necessarily false when he adduced it.

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[3] The text of the advertisement appears at J. 1352a.

[4] The United States Attorney has refused repeated requests for permission to inspect and copy from Court Exhibits 83 and 84, in aid of this petition; and the trial judge denied access to Court Exhibit 82 (J. 1357a).

(1)

D. The government's admissions below, regarding the falsity of Carroll's testimony and the prosecutor's prior knowledge of its falsity, and the prosecutor's written admissions of such knowledge:

The government conceded below perforce that Carroll's testimony, about conversations with petitioner and in his presence regarding Texas-Adams *before the advertisement "that led to Texas-Adams"*[5], was necessarily false. It made admissions which plainly imply that the prosecutor knew the testimony was necessarily false when he adduced it. And the prosecutor himself made written statements in a prior trial memorandum showing such knowledge.

In view of the importance of the government's admissions, and to bar any question of mistaken interpretation, the relevant portion of its answering brief below is quoted in the margin[5] (pp. 222-3). These admissions plainly con-

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[5] The meetings on July 15 and 22 preceded the advertisement. The meeting on August 8, 9 or 10 probably preceded it, and certainly preceded Crosby's first meeting with the broker defendants.

[5] "Carroll's testimony that Texas-Adams was mentioned at the July 22 meeting was unquestionably wrong. And it was the government that proved he was mistaken. For Holland, who preceded Caroll, testified that only Dumont was mentioned at that meeting and that Texas-Adams' name did not come up until mid-September (J. 336a-37a, 348a). And the government established through Rosen that the advertisement which led to Texas-Adams was placed in early August (J. 1337a). * * *

"Carroll's recollection was in eror, but Mittelman, apparently, would have had Government trial counsel prevent him from testifying to what was his recollection,[143a] a grossly improper suggestion. Instead, the prosecutor, with commendable candor and fairness, put both Carroll's testimony and the contradictory testimony in evidence.

"Though the Government had no choice but to permit Carroll to testify as his recollection dictated, in the trial memorandum relating to the Homestead evidence, which was submitted to the

tradict the finding below "that any direct or veiled charge of actual misconduct leveled against the government's attorneys is wholly without substance" (294 F. 2d at p. 946).

4.

First: In response to petitioner's brief below, which demonstrated the falsity and conscious use of the testimony regarding the July 22 meeting, the government's answering brief conceded that "*Carroll's testimony* that Texas Adams was mentioned at the July 22 meeting *was unquestionably wrong*"; and it added in a related footnote: "There is, of course, no way of knowing whether Carroll's recollection was in error *or whether he wilfully perjured himself.*" (pp. 222-3; emphasis added). These admissions apply with the equal force to the July 15 and August 8-10 meetings.

Second: The answering brief sought to excuse the offer of the July 22 testimony by asserting the government proved

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Trial Judge before the evidence was offered, the Government rejected Carroll's testimony, as the following excerpts reveal:

> '5 On July 22, . . . Homestead was told by Mittelman that various mergers and acquisitions . . . would be effectuated. *No mention of Texas-Adams was made.*' (Emphasis added.)

"And, in setting forth the facts of the mid-September conference between Holland, Mittelman and McCarthy, the memorandum states:

> '11. • • • McCarthy, in Mittelman's presence, stated that he and his group were in control of Texas-Adams • • •. Previously other companies had been mentioned. ***This was the first mention of Texas-Adams*** • • •.' (Emphasis added.)"

"'148a. There is, of course, no way of knowing whether Carroll's recollection was in error or whether he wilfully perjured himself • • •."

Carroll was mistaken by prior and allegedly contradictory testimony of Holland respecting that meeting, and its proof through Rosen "that the advertisement which led to Texas Adams was placed in early August". The excuse will be dealt with later. Its significance here is the plain implication that the prosecutor knew Carroll's testimony was false when he adduced it.

Third: An admission of such knowledge is implicit in the argument that it would have been "grossly improper" to prevent Carroll from testifying to what was his recollection", and that the government "had no choice but to permit Carroll to testify as his recollection dictated".

Fourth: Finally, the admissions regarding the trial memorandum, which was submitted *before* Carroll testified, are conclusive. The answering brief flatly stated that in the memorandum "*the Government rejected Carroll's testimony*", and quoted in proof of such prior rejection statements that "no mention of Texas Adams was made" at the July 22 meeting and that "the first mention of Texas-Adams" was made in mid-September. Assuming *arguendo* that the trial judge regarded those statements as a rejection of Carroll's testimony, he failed to instruct the jury regarding its conceded falsity. And, of course, the prosecutor made no such statements or disavowal before the jury.

(2)

The excuse, that the government itself proved Carroll "was mistaken" regarding the July 22 meeting through Holland's prior testimony "that only Dumont was mentioned at that meeting and that Texas Adams' name did not come up until mid-September (J. 336a-37a, 348a)", was meretricious. If Holland had given such testimony, it

could not excuse a deliberate offer of contradictory testimony which the prosecutor knew was false. But even the excuse itself was false: Holland gave no such testimony; it ignored the fact that Holland was not present at the earlier meeting in New York (J. 518a) and therefore could not contradict Carroll's testimony about that meeting; and it was silent about the August testimony.

(3)

The proposition, that the government is under a duty to adduce false and prejudicial testimony at the behest of a witness it knows is either mistaken or perjurious, is palpably indefensible. But, assuming its validity *arguendo*, its necessary corollary is a duty to disavow such testimony before the jury. There was no such disavowal by the prosecutor in summation or elsewhere: there was none by the trial judge in his charge or elsewhere; and the latter refused to entertain exceptions or requests to charge on the facts (J. 1847-8a, 1852a).

E. The question of due process:

The proposition, that a serious question of due process is raised by the deliberate use against petitioner of prejudicial testimony which could not be true and probably constituted wilful perjury, hardly requires supporting argument.

Questions of probable guilt or innocence, or of the weight of the evidence, a irrelevant here. The prosecution's conceded and deliberate use of false and prejudicial testimony may not be swept under the rug of the "harmless error" rule; it involves not only a denial of due process, but also the integrity of the administration of justice, and the honor of the Government of the United States.

In *Mooney* v. *Holohan*, 294 U. S. 103 at p. 113, this Court condemned "a deliberate deception of court and jury by the presentation of testimony known to be perjured", as "inconsistent with the rudimentary demands of justice". Here the injury to petitioner is the same, whether the prosecutor knew that Carroll was committing perjury or merely that his testimony could not be true. In either case, his testimony was tainted.

In *Mesarosh* v. *United States*, 352 U. S. 1, this Court said (p. 9):

> "The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other just result than to accord petitioner a new tiral".

This is a stronger case than *Mesarosh;* for there the government's use of perjured testimony was unwitting, and the government itself sought to remedy the injustice; but here the use was conscious and deliberate, and the government has thus far attempted to defend it.[6]

And in *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115, 124, the Court held in effect that tainted evidence invalidated a finding however amply supported by other evidence. That was a civil proceeding before an administrative body. The holding applies with greater force to a criminal trial before a jury (see *e.g.*: *Napue* v. *Illinois*, 360 U. S. 264; *People* v. *Savvides*, 1 N. Y.

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[6] The Government's brief opposing the petition for a writ of certiorari was silent about Carroll's false testimony and its conscious use by the prosecution—perhaps because the petition failed to state the relevant facts with sufficient force and clarity. Petitioner has faith that the Solicitor General will meet the grave questions they raise with the candor this Court commended in *Mesarosh, supra.*

2d 554, 557-8; *Coggins* v. *O'Brien*, 188 F. 2d 130, 139 (3 Cir.); *Kyle* v. *United States*, 297 F. 2d 507, 513-14 (2 Cir.)).

F. The question of remand:

Any doubt regarding the prosecutor's knowing use of Carroll's false testimony must be resolved by remand for an appropriate hearing.

Conclusion.

It is respectfully submitted that substantial justice requires reconsideration of the petition for a writ of certiorari.

The undersigned hereby certifies that this petition is presented in good faith and not for delay.

Respectfully submitted,

EDWARD M. GARLOCK,
Counsel for Petitioner.

Certificate of Service.

I, Edward M. Garlock, attorney for the petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on April 7, 1962, I served 3 copies of the foregoing petition for rehearing on the United States of America, by mailing them in a duly addressed envelope, with air mail postage prepaid, to the Solicitor General, Department of Justice, Washington 25, D. C.

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